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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1707

IN RE: ESTATE OF HENRY W. BIDDLE, DECEASED

CHARLES A. DaCOSTA, JR.
and
PETER M. DaCOSTA,

Petitioners

v.

JAMES MURDOCK DaCOSTA
and
THE FIDELITY BANK,

Respondents

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, James Murdock DaCosta, opposes the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania submitted by Charles A. DaCosta, Jr. and Peter M. DaCosta, Petitioners. Petitioners have presented no compelling reasons for this Court to grant the Writ in

this routine will construction matter. The constitutional issue now presented was not properly raised in the courts below. Contrary to Petitioners' assertions, no vested rights have been infringed upon, and, in any event, the decision of the Supreme Court of Pennsylvania is prospective only in its application.

OPINIONS BELOW

The Opinion of the Supreme Court of Pennsylvania is reported unofficially at 410 A. 2d 782 (Pa. 1980). It has not yet been officially reported.

The case of *Biddle Trust,* 102 Montg. 184, 27 Fiduc. Rep. 97 (O. C. Montg. 1976), cited by Petitioners as a related case, is irrelevant to this proceeding.

In all other respects, Respondent is satisfied with Petitioners' presentation of the opinions below.

JURISDICTION

Petitioners failed to raise and preserve the Due Process issue in the courts below.

The relevant statutory provision is 28 U. S. C. § 1257 (3), and not 27 U. S. C. § 1257(3).

In all other respects, Respondent is satisfied with Petitioners' presentation regarding the jurisdiction of the Court.

CONSTITUTIONAL PROVISION INVOLVED

Assuming a Due Process issue is presented, Respondent is satisfied with Petitioners' presentation of the relevant constitutional provision.

QUESTION PRESENTED

Should this Court expend its resources to review a routine will construction case, where no Due Process issue

was properly raised in the courts below, where no vested rights of Petitioners are involved or affected and where the decision of the Pennsylvania Supreme Court has prospective application only.

STATEMENT OF THE CASE

This case is an ordinary will construction matter under state law. It presents the issue whether an adopted child is entitled to share in future, undistributed trust income on an equal basis with natural children under a testamentary gift to "children."

The Testator, Henry W. Biddle, died on July 2, 1923, leaving a Will dated December 16, 1920 and Codicil dated June 23, 1923. In Paragraph SIXTH of the Will, the Testator created a trust providing that upon the death of a daughter, income should be paid to Testator's grandchildren, per capita, and the issue of deceased grandchildren, per stirpes. The trust further provides:

> "If, however, during the continuance of said trust, any of such grandchildren shall die, leaving *children* or *issue* of deceased children him or her surviving, such *children* and *issue* of deceased children to take among them, per stirpes, the share of income which their parent would have taken if living." (emphasis supplied).

On February 9, 1950, one of Testator's grandchildren, C. Alexander DaCosta, died. He was survived by two natural children, Charles A. DaCosta, Jr. and Peter M. DaCosta (Petitioners), and one adopted child, James Murdock DaCosta (Respondent).

In 1951, the Trustee filed its Account and requested an award of the income which was previously distributable to C. Alexander DaCosta in equal shares to the Guardians

of the Estates of Petitioners, both of whom were then minors. On January 21, 1952, the Account was confirmed absolutely, no question having been raised before the court as to whether Respondent was entitled to share in the trust income.

On November 17, 1972, the Supreme Court of Pennsylvania filed its decision in *Tafel Estate,* 449 Pa. 442, 296 A. 2d 797 (1972). The court held that in the absence of a contrary intent expressed in a will, the testator is presumed to have intended to treat adopted children in the same manner as natural children. Thus, a testamentary gift to "children" includes adoptees.

On the basis of *Tafel,* Trustee filed an account in 1976 to determine Respondent's rights, if any, to *future,* undistributed trust income. Trustee took the position, pursuant to *Tafel,* that Respondent was entitled to share in future trust income; that is, post-1976 trust income.

Petitioners filed Objections to the Trustee's Statement of Proposed Distribution. The Objections did not raise the Due Process issue which Petitioners are now requesting this Court to review. Respondent appeared at the Audit and asserted his claim to a share of future trust income. The Auditing Judge and the Orphans' Court en banc denied Respondent's claim on res judicata grounds. Petitioners never raised the Due Process issue in the Orphans' Court, either before the Auditing Judge or before the court en banc. Their brief in the Supreme Court of Pennsylvania includes an offhand reference to the Fourteenth Amendment.

The Supreme Court of Pennsylvania reversed the Orphans' Court decision, thus upholding Respondent's claim. The court did not consider Petitioners' Due Process argument now raised seriously for the first time in the Petition for Writ of Certiorari.

ARGUMENT

This case does not present a question worthy of this Court's consideration; on the contrary, this case presents a simple issue of will construction involving the definition of "children" and whether an adoptee may share in trust income as a "child". The constitutional issue of Due Process is not presented by this case. In fact, Petitioners have failed to cite any cases which hold that there is any Due Process issue involved. To the extent that the cases cited by Petitioners even discuss Due Process, the discussion is purely dictum.

The Court should not grant the Writ for three reasons: first, the constitutional issue of Due Process was not properly raised below; second, as a matter of state law, no vested property rights are affected or involved; and finally, this case affects only future, undistributed trust income, therefore presenting no question of retroactivity.

1. The Constitutional Issue Was Not Properly Raised Below.

Petitioners failed properly to raise or preserve below the constitutional issue which is now being presented to the Court. Therefore, the Court should not exercise its jurisdiction under 28 U. S. C. § 1257(3). *Ferguson v. Georgia*, 365 U. S. 570 (1961); *In re Lamkin*, 355 U. S. 59 (1957). Petitioners did not at any time raise the issue in the Orphans' Court, either before the Auditing Judge or before the court en banc. The Pennsylvania Supreme Court has ruled that questions cannot be presented for the first time on appeal. *See, e.g., Abrams Will*, 419 Pa. 92, 213 A. 2d 638 (1965); *Montgomery County Bar Association v. Rinalducci*, 329 Pa. 296, 197 A. 924 (1938). Therefore, the question is not properly before this Court.

The Petition states that the question was raised in Petitioners' appellate brief and at oral argument. This is clearly insufficient to establish that a federal question was properly raised. *Lynch v. New York ex rel. Pierson,* 293 U. S. 52 (1934); *Live Oak Association v. Railroad Commission,* 269 U. S. 354 (1926). Moreover, the Pennsylvania Supreme Court did not even address the constitutional issue. Therefore, this Court may properly assume that the issue was not properly raised in the state courts. *Street v. New York,* 394 U. S. 576 (1969).

For all of these reasons, the Court should not exercise its jurisdiction under 28 U. S. C. § 1257(3).

2. No Vested Property Rights Are Involved.

The decision of the court below does not deprive Petitioners of any vested rights. Testator's Will provides that the "children" of a deceased grandchild are entitled to share in trust income. The decision applies a new rule of law in construing the word "children" to include adoptees. This new rule of construction, as enuncited in *Tafel,* does not apply when a testator's intent is affirmatively expressed; it only applies where no such intention appears. No expressed intention of the Testator has been disturbed in this case. *Tafel* changed only the presumption to be applied in the absence of such intent. Thus, no vested rights have been violated.

The Supreme Court of Pennsylvania has confirmed this proposition. "[A] vested property right cannot exist in a rule of law." *Catherwood Trust,* 405 Pa. 61, 72, 173 A. 2d 86, 91 (1961) *overruled on other grounds, Pew Trust,* 411 Pa. 96, 191 A. 2d 399 (1963). Thus, under state law, Petitioners have no vested property right in a rule of construction defining the term "children" and can therefore raise no colorable Due Process claim.

Moreover, *Tafel* states that the prior Pennsylvania decisions, which applied the old rule of construction in excluding adoptees as "children", were erroneous. In fact, the court stated that it was undertaking "[a] fresh reading of the adoption statutes", forcing it to "disavow" its earlier position. 449 Pa. at 449, 296 A. 2d at 800. The correction of a previous misinterpretation of a statutory provision is entirely appropriate and fundamentally different from a retroactive application of a newly-created rule of law. Thus, if a vested property right cannot exist in a rule of construction, such right cannot possibly exist in a rule which is admittedly erroneous.

3. The Decision Below Applies Prospectively Only.

The decision below applies to future, undistributed income of the trust. No income which was distributed prior to the audit in 1976 is affected by the decision below. The court emphasized the prospective nature of Respondent's claim:

> ". . . [he] makes no claim to any trust income already distributed, rather he seeks only to participate in future distributions of income generated by the trust." 410 A. 2d at 785.

Thus, Petitioners' assertion of retroactivity is without merit.

Under Pennsylvania law, it has long been held that "[a] rule of law made in the distribution of a portion of an estate is not binding in a subsequent adjudication relating to another portion." *Estate of DeRoy,* 481 Pa. 403, 410, 392 A. 2d 1355, 1358 (1978). *See also Estate of Flinn,* 479 Pa. 312, 323, 388 A. 2d 672, 677 (1978) quoting *Arrott Estate,* 421 Pa. 275, 280, 217 A. 2d 741, 744 (1966); *Kellerman's Estate,* 242 Pa. 3, 11, 88 A. 865, 868

(1913). Moreover, "it was the duty of the auditing judge to require that the present allocation be controlled by the law in effect at the time of the audit." *Arrott Estate,* 421 Pa. 275, 281, 217 A. 2d 741, 744 (1966). Thus, each accounting in the administration of a Pennsylvania trust is treated as a separate and distinct fund, and no question of retroactive application arises.

CONCLUSION

For all of the above reasons, Respondent urges the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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